Filed 6/10/19 P. v. Keshmiri CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. KOUROSH KESHMIRI, Defendant and Appellant.	G054611 (Super. Ct. No. 16HF1046) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Cheri T. Pham, Judge. Affirmed.

Ferrentino & Associates and Correen Ferrentino for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Melissa Mandel, Meredith White, Stephanie H. Chow and Mary Ryle, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Kourosh Keshmiri was convicted of implied malice murder for causing a fatality while driving under the influence of alcohol (DUI). On appeal, he contends: 1) The police violated his Fourth Amendment rights by drawing his blood without a warrant; 2) the trial court err in admitting evidence of his drunk driving history; and 3) the introduction of his prior "*Watson* advisement" (see *People v. Watson* (1981) 30 Cal.3d 290 (*Watson*)) lessened the prosecution's burden of proof. Finding these contentions unmeritorious, we affirm the judgment.

FACTS

On the night of December 29, 2013, appellant and his friend Nasir Faryabi went to a hookah lounge in Irvine. After spending a couple of hours there, they met some friends at a nearby diner for a late-night meal. It was after 2:00 a.m. when they left the diner and Faryabi drove appellant to his home in Mission Viejo.

Faryabi was driving a Cadillac CTS-V, a luxury vehicle he prided for its performance. When he arrived at appellant's house to drop him off, appellant asked if he could test drive the car. Faryabi agreed, and the two exchanged seats. Then appellant started driving the Cadillac around his neighborhood at a high rate of speed. Faryabi told him to slow down several times, but appellant got the car up to about 60 m.p.h. before he lost control and crashed it into a house on Pacato Drive. The car plowed into the bedroom of Kenneth Jackson, killing him in his sleep.

Following the crash, appellant started running, but Faryabi convinced him to return to the scene, where he was soon contacted by the police. Appellant initially told the responding officers that Faryabi was driving the Cadillac. However, he eventually admitted he was behind the wheel when it crashed. In speaking with appellant, the officers noticed his eyes were watery and he smelled of alcohol. After subjecting him to a series of field sobriety tests, they arrested him for DUI.

Offered the choice of taking a breath test or a blood test, appellant chose the former. However, although the officers gave him many opportunities to do so, he did not

blow hard enough to produce a reading on the breath test machine, so he ended up having his blood taken around 6:00 a.m. At that time, appellant's blood alcohol level was .15 percent, meaning it would have been around .20 percent at the time of the crash.

Appellant was charged with second degree implied malice murder for killing Jackson in December 2013. In addition, he was charged with two counts of DUI arising from an unrelated incident that occurred six months earlier, on June 6, 2013. Before trial, appellant successfully moved to sever the charges, so the murder count was adjudicated separately. However, at the murder trial, the prosecution presented evidence related to the June 6 incident, including the circumstances of appellant's arrest and the fact he was ordered to abstain from alcohol as a condition of his release. The prosecution also presented evidence appellant was convicted of DUI in 2010, and during the proceedings in that case, he was advised per *Watson* that drinking and driving is extremely dangerous to human life. At that time, appellant was also ordered to attend alcohol awareness classes that illustrated the perils of drunk driving.

Faryabi testified he did not see appellant drink any alcohol on the night he killed Jackson. However, the jury convicted appellant as charged, and the trial court sentenced him to 15 years to life in prison. Appellant also ended up pleading guilty to two counts of DUI based on the June 6, 2013 incident. We affirmed appellant's conviction in that case in *People v. Keshmiri* (June 27, 2018, G054606) [nonpub. opn.], of which we have taken judicial notice.

I

Legality of Blood Draw

Appellant contends the trial court erred in admitting the results of his blood test into evidence because the police obtained his blood in violation of the Fourth Amendment. However, the record shows appellant consented to have his blood drawn after he was unable to complete a breath test. Therefore, the admission of his blood test results was proper.

The legality of appellant's blood draw was litigated at a pretrial suppression hearing. At the hearing, Sheriff's Deputy Adam Sandler testified to the circumstances surrounding appellant's arrest, and the court reviewed the transcript of a recorded conversation that took place between Sandler and appellant at the scene.[1] The evidence showed that after arresting appellant for DUI, Sandler asked him if he wanted to take a breath test or a blood test. Appellant opted for a breath test, but after trying "approximately five times," he failed to blow hard enough into the breathing tube to complete the test.

At that point, Sandler told appellant he could just do a blood test at the Santa Ana jail. Appellant was not keen on that idea. He told Sandler the last time he was arrested and did a blood test at the jail, they kept him there overnight, and he had to miss work the following day. He said he did not want that to happen again this time around because he might lose his job.

Although Sandler assured appellant he would not have to miss any work, appellant continued to balk at the idea of going down to the jail. Saying he wanted to go home instead, he asked Sandler what was going to happen to him. Sandler said, "You cooperate and you do [a] blood [test at the jail], and you'll be out in a couple hours." However, appellant remained skeptical and reiterated his concern about missing work. He feared that if he went to the jail for a blood test, he would have to stay there several days, even though Sandler told him that was not going to happen.

Throughout this time, appellant kept asking Sandler if he could try taking the breath test again. But he had failed that test so many times the machine voided out and became inoperable. Thus, as Sandler explained to him, the breath test was no longer an option.

---

[1] In the transcript, Sandler is mistakenly identified as Sheriff's Deputy Miguel Pallanes. This clerical error was brought to the trial court's attention at the suppression hearing.

Nevertheless, knowing that appellant did not want to go to the jail, Sandler arranged for him to have his blood drawn at the Mission Viejo City Hall. When advised of that, appellant asked if he would be able to go home after they took his blood. Sandler said he could not make any promises in that regard. Rather, that was something he would have to decide if and when appellant successfully completed the blood test.

As they were pulling into city hall in Sandler's squad car, Sandler was finalizing arrangements over his radio. Then he and appellant had the following exchange:

"[Sandler]: Okay, they said we can do the blood [test] right here. Is that good?

"[Appellant]: What?

"[Sandler]: Then . . . you don't have to go anywhere.

"[Appellant]: Okay, that's fine, then."

Appellant's blood was drawn at city hall. Alas, after that, he was taken to the jail and booked on drunk driving charges.

At the suppression hearing, appellant argued his blood draw was illegal for lack of a warrant or valid consent. While conceding he acquiesced to having his blood drawn, he claimed his purported consent was based on the false promise he would be released afterwards. The trial court did not see it that way. It found appellant voluntarily consented to having his blood drawn once Sandler explained to him the procedure could be done at city hall. Therefore, it denied appellant's motion to suppress the results of his blood test.

When the police draw blood from a person arrested for drunk driving, they must comply with the Fourth Amendment. (*Schmerber v. California* (1966) 384 U.S. 757 [the compulsory administration of a blood test is a "search" within the meaning of the Fourth Amendment].) However, that does not mean the police must always obtain a warrant before drawing a suspect's blood. If exigent circumstances are present, or the

suspect consents to having his blood drawn, no warrant is required. (*Missouri v. McNeely* (2013) 569 U.S. 141; *People v. Harris* (2015) 234 Cal.App.4th 671.)

Here, the prosecution relied on the consent exception to the Fourth Amendment's warrant requirement. '"To be effective, consent must be voluntary. [Citations.]' [Citation.] '[W]here the validity of a search rests on consent, the [s]tate has the burden of proving that the necessary consent was obtained and that it was freely and voluntarily given, a burden that is not satisfied by showing a mere submission to a claim of lawful authority. [Citations.]' [Citation.]" (*People v. Harris, supra,* 234 Cal.App.4th at pp. 689-690; see, e.g., *Bumper v. North Carolina* (1968) 391 U.S. 543 [consent deemed invalid where it was given in response to an officer's representation he had a search warrant].)

"Whether defendant's consent was voluntary rather than in submission to an express or implied assertion of authority is a question of fact to be decided in light of all the facts and circumstances. [Citations.]" (*People v. Superior Court (Peck)* (1974) 10 Cal.3d 645, 649.) On appeal, we must draw all reasonable inferences in favor of the court's decision and uphold that decision if it is supported by substantial evidence. (*People v. James* (1977) 19 Cal.3d 99, 107; *Davis v. Kahn* (1970) 7 Cal.App.3d 868, 874.)

Appellant contends the only reason he consented to having his blood drawn is because Sandler falsely promised he would be able to go home after the procedure was over. The argument is that by leading him on that way, Sandler implied a blood test was required for his release. Therefore, when he consented to have his blood drawn, he was merely submitting to a claim of lawful authority, not giving true, valid consent for the draw. We cannot agree.

When the issue of a blood test first came up, appellant made it clear he did not want to have his blood drawn at the jail for fear he would have to stay there overnight and miss work the following day. Sandler assured appellant that was not going to happen

because people who have their blood drawn at jail are only held there for a couple of hours. However, appellant did not believe him and continued to resist the idea of going there for a blood test. Therefore, Sandler changed his plan and arranged for appellant to have his blood drawn at city hall. Appellant did not oppose this idea. To the contrary, he said "that's fine" when Sandler asked him if they could do the blood test there. Moreover, in discussing that prospect, Sandler never promised appellant he would be released after the test. He explicitly told appellant he could not make any promises about what was going to happen.

These facts belie appellant's claim he consented to the blood draw only because Sandler promised it would lead to his quick release. While there is no question appellant wanted to go home after his blood test, the record does not support his claim that Sandler promised that would happen. Rather, the record substantially supports the trial court's ruling that appellant voluntarily consented to have his blood drawn once Sandler arranged for the procedure to take place at city hall as opposed to the jail – which appellant apparently thought made a quick release more likely. That being the case, we uphold the court's decision to admit the results of appellant's blood test into evidence.

II

Admissibility of Prior Drunk Driving Evidence

Appellant also contends the trial court erred in admitting evidence he was convicted of DUI in 2010 and arrested for the same on June 6, 2013, six months before the present case arose. He claims 1) the arrest evidence was illegally obtained, 2) even if it was not, the trial court was barred from admitting it under the doctrine of collateral estoppel, and 3) both the arrest evidence and the conviction evidence were immaterial and unduly prejudicial. We find these claims unavailing.

Appellant's first claim merits short shrift. He contends the evidence surrounding his June 6, 2013 arrest was derived from an illegal detention, but we decided that exact issue against him in his prior appeal of the DUI case. (See *People v. Keshmiri*,

supra, G054606, at pp. 3-8.) Under the doctrine of collateral estoppel, appellant is precluded from raising that issue again in this appeal. (*People v. Vogel* (2007) 148 Cal.App.4th 131.) "This result promotes judicial economy, prevents the possibility of an inconsistent determination that would undermine the integrity of the judicial system, and provides repose to the People." (*Id*. at p. 139.)

However, collateral estoppel principles did not preclude the trial court from admitting the evidence regarding appellant's arrest for DUI on June 6, 2013. In arguing otherwise, appellant relies on the fact the charges stemming from his June 6 arrest were severed from his murder case before it was assigned for trial.[2] In his view, the severance ruling effectively resolved the admissibility issue, and therefore the trial court was collaterally estopped from admitting any evidence pertaining to the severed DUI counts. That is not the way we see it.

"Under the doctrine of collateral estoppel, a party cannot relitigate an issue of ultimate fact that was determined by a valid and final judgment in a previous lawsuit between the same parties. [Citations.]" (*People v. Yokely* (2010) 183 Cal.App.4th 1264, 1272.) The issue regarding the admissibility of the evidence stemming from appellant's June 6 arrest was not decided as part of his severance motion. Although the severance motion involved some of the same considerations bearing on the admissibility of that evidence, that was not enough to trigger the collateral estoppel doctrine. (See *id*. at pp. 1272-1275 [federal court's ruling on Sixth Amendment claim did not prevent state trial court from admitting evidence related to that claim].) The trial court was free to consider whether the facts related to appellant's June 6 arrest should come into evidence. (*United States v. Levinson* (6th Cir. 1968) 405 F.2d 971, 987 [the granting of a severance motion does not preclude the trial judge from admitting relevant evidence pertaining to the severed counts]; *Terry v. State* (Ga. 1989) 377 S.E.2d 837, 839-840 [same].)

---

[2] The severance motion was adjudicated by Judge Glenda Sanders.

Appellant also asserts the evidence from his 2013 and 2010 DUI cases constituted inadmissible propensity evidence under Evidence Code section 1101. Pursuant to that section, evidence of the defendant's prior misconduct is generally inadmissible to prove his behavior on a specific occasion or his propensity for criminal activity. (Evid. Code, § 1101, subd. (a).) But such evidence may be admitted if it is relevant to some other issue in the case, such as knowledge or intent. (*Id.*, subd. (b).) While evidence of prior bad acts may be excluded under Evidence Code section 352 if its probative value is substantially outweighed by its prejudicial effect, the trial court has considerable discretion in making this determination. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404–405.) Indeed, rulings made under Evidence Code sections 1101 and 352 will not be disturbed on appeal unless they are arbitrary, capricious or patently absurd. (*People v. Rogers* (2013) 57 Cal.4th 296, 326.)

The trial court's ruling in this case does not fall into any of those categories. Appellant was tried for second degree implied malice murder, which has two components. The objective component is satisfied when the defendant commits an act that would naturally and probably result in danger to human life, and the subjective component requires proof the defendant knew the act was dangerous to human life but did it anyway. (*People v. Knoller* (2007) 41 Cal.4th 139, 152.) The evidence from appellant's DUI conviction in 2010 was highly relevant to the subjective component because it tended to prove appellant was aware DUI – the act at issue here – is dangerous to human life. In fact, the *Watson* advisement appellant received in that case was designed for that very purpose, and the alcohol awareness classes he attended emphasized that point as well. California courts have repeatedly upheld the admission of such evidence to prove the defendant's awareness of the life-threatening risks of DUI. (See *People v. Ortiz* (2003) 109 Cal.App.4th 104 [surveying the cases in this area].)

The evidence regarding appellant's June 6, 2013 arrest was also probative of the subjective component of implied malice. On that occasion, a police officer

contacted appellant and two other men in a closed park after midnight. (*People v. Keshmiri*, *supra*, G054606, at p. 2.) Noticing signs the men had been drinking, the officer advised them not to drive, and they assured him they would not do so. (*Id*. at pp. 2-3.) But as soon as the officer was out of sight, they got into their cars and began driving away. (*Id*. at p. 3.) When the officer circled back to the area, he stopped their vehicles and found appellant behind the wheel of one of them. "Smelling of alcohol and unable to pass a field sobriety test, appellant was arrested at the scene. A subsequent blood test revealed his blood alcohol level was twice the legal limit." (*Ibid*.)

This evidence was relevant because it provided a concrete example of appellant blatantly disregarding the risks of DUI. The officer never specifically told appellant that DUI is dangerous to human life, but it's hard to imagine appellant did not understand that at the time, given the circumstances of the encounter, and given all the information he had previously received in connection with his DUI conviction in 2010. Based on the fact he flouted the dangers of DUI in June 2013, the jury could reasonably infer he harbored the requisite intent for implied malice murder when he killed Jackson while driving under the influence six months later. (See *People v. Robbins* (1988) 45 Cal.3d 867, 879, superseded by statute on another ground as noted in *People v. Jennings* (1991) 53 Cal.3d 334, 387, fn. 13 [the recurrence of an unlawful act tends to suggest it was done with the requisite criminal intent, as opposed to some other innocent mental state].) We cannot quarrel with the court's conclusion the circumstances surrounding his June 2013 arrest were relevant in this case.

So was the fact the judge in his June 2013 case ordered him not to drive as a condition of his release. Coming on the heels of appellant's arrest for DUI, the judge's order further underscored the point that DUI is an extremely dangerous activity, which was relevant to appellant's mental state here. (See *People v. Ortiz, supra*, 109 Cal.App.4th at pp. 112-116 [every time a person is arrested, convicted, or suffers some

other adverse consequence as a result of drunk driving it logically increases their awareness of the dangerousness of that activity].)

Still, appellant argues there was no need for the jury to know precisely how intoxicated he was during his prior DUI incidents, and therefore it was error to allow the prosecution to present evidence his blood alcohol level was .14 percent when he was arrested in his 2010 case and .20 percent when he was arrested again in 2013. However, it is commonly understood that the risk associated with DUI increases as the driver's blood alcohol level increases. All other things being equal, it is reasonable to conclude a person whose first DUI was at a lower level than his second is a person who has in no way been deterred by the experience, even though he should have a greater understanding and awareness of that risk than a person who gets arrested for driving with a blood alcohol level just above the legal limit. Therefore, we cannot say the details surrounding appellant's level of intoxication during his prior DUI episodes were irrelevant to the proceedings.

As far as prejudice is concerned, the subject evidence was not unduly remote or time consuming, nor was it particularly inflammatory in comparison to the egregious facts involved in the present case. Also, the trial court instructed the jurors they could only consider that evidence for the limited purpose of determining whether the subjective component of implied malice murder was proven, and they could not use it to conclude appellant had a bad character or was disposed to commit the alleged offense. There being no indications to the contrary, we presume the jury abided by the court's instructions in this regard. (See *People v. Mickey* (1991) 54 Cal.3d 612, 689, fn. 17 ["The crucial assumption underlying our constitutional system of trial by jury is that jurors generally understand and faithfully follow instructions."]; *People v. Ortiz*, *supra*, 109 Cal.App.4th at p. 118 [limiting instruction mitigated potential prejudice stemming from the admission of prior bad acts evidence in prosecution for implied malice murder].)

All things considered, we conclude the trial court did not abuse its discretion in admitting the evidence pertaining to appellant's prior drunk driving history. The evidence did not violate the Evidence Code or infringe appellant's fair trial rights.

III

The Watson Advisement

Lastly, appellant claims the evidence of his prior *Watson* advisement lessoned the prosecution's burden of proof by removing the element of implied malice from the jury's consideration. Again, we disagree.

At trial, the court took judicial notice of the fact that in pleading guilty to DUI during his 2010 case, appellant was advised per *Watson* that "being under the influence of alcohol or drugs or both impairs the ability to safely operate a motor vehicle. Therefore, it is extremely dangerous to human life to drive while under the influence of alcohol or drugs or both. If you continue to drive while under the influence of alcohol or drugs or both and, as a result of that driving, someone is killed, you can be charged with murder."

The trial court also instructed the jury this advisement "was admitted for the limited purpose of proving the knowledge required for [implied malice murder]. You may consider [the advisement] only for that purpose and for no other. This evidence may not be used as proof of the defendant's conduct, or that he committed any act, on a specified occasion."

In a criminal case, due process requires the prosecution to prove every element of the charged offense beyond a reasonable doubt. (*In re Winship* (1970) 397 U.S. 358, 364.) And when the case is tried before a jury, they must decide whether the prosecution has carried its burden in that regard. (*Sandstrom v. Montana* (1979) 442 U.S. 510, 520-523.) Therefore, trial court instructions that require the jury to make presumptions that effectively establish a disputed element of the charged offense are unconstitutional. (*Ibid*.) The problem with such mandatory presumptions is that they

undermine the presumption of innocence and invade the core factfinding function of the jury. (*Ibid*.)

Relying on *People v. Vanegas* (2004) 115 Cal.App.4th 592 (*Vanegas*), appellant contends that is what the evidence of his *Watson* advisement did in this case. Like appellant, the defendant in *Vanegas* was charged with implied malice murder for killing a person with his car. However, the charge was predicated on the defendant's act of violating the basic speed law, not DUI. (*Id*. at p. 599.) At trial, the court instructed the jury violating the basic speed law *is* inherently dangerous to human life. (*Ibid*.) "The court did not tell the jury it had a choice [regarding that issue] or that it could reasonably *infer* certain acts were inherently dangerous." (*Id*. at p. 600.) Instead, the jury was effectively told that if it found the defendant violated the basic speed law, it must also find he committed an inherently dangerous act that satisfied the actus reus requirement of implied malice murder. (*Ibid*.) *Vanegas* held this instructional framework created an impermissible mandatory presumption in derogation of the defendant's due process rights. (*Id*. at p. 602.)

Vanegas is distinguishable from our case in two important respects. First, it centered on instructions regarding the dangerousness of the defendant's act, whereas the *Watson* advisement here was used to prove appellant's mental state. Indeed, the trial court instructed the jury it could not use the advisement to prove the defendant's conduct or that he committed a particular act. Therefore, even though the advisement stated driving under the influence is extremely dangerous to human life, the jury was precluded from using it to prove the actus reus requirement of implied malice murder.

Second, appellant's jury was not required to draw any particular inference from the advisement. The advisement was offered as circumstantial evidence to prove the knowledge element of implied malice murder, and the court told the jurors they "may consider" the advisement for that purpose. However, the jury was not obligated to do so.

Because the jury had a choice in terms of how to construe the advisement evidence its introduction did not violate the prohibition against mandatory presumptions.

DISPOSITION

The judgment is affirmed.

BEDSWORTH, J.

WE CONCUR:

O'LEARY, P. J.

THOMPSON, J.